United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -X

MILTON SILVERMAN,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

- -X

Docket No. 76-2073
(76-2085)

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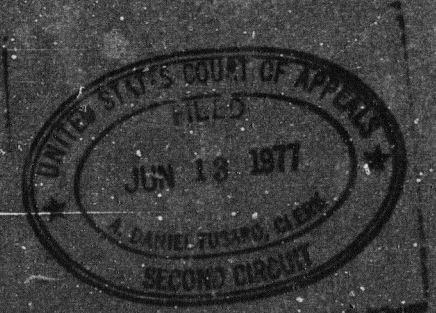
STAY OF MANDATE



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PETITION FOR REHEARING,

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Appellant Milton Silverman, by counsel, hereby respectfully petitions for a rehearing of his appeal, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, decided by this Court on May 31, 1977, opinion by the Honorable Charles E. Wyzanski, Jr., Senior District Judge, concurred in by the Honorable James L. Oakes, Circuit Judge, and the Honorable James S. Holden, Chief Judge of the District of Vermont, on the points of law and facts hereinafter set forth. Alternatively, appellant suggests a hearing en banc so that this Court may set forth minimum standards of due process required in determining petitions pursuant to 28 U.S.C. § 2255. Failing either of the

former, appellant also moves for a stay of the mandate pursuant to Rule 41 of the Federal Rules of Appellate Procedure pending application to the Supreme Court for a writ of certiorari.

A R G U M E N T

PROCEDURAL DUE PROCESS WAS DENIED HERE AND BELOW

This Court's apparent holding herein that a decision on a motion under Rule 60(b) of the Federal Rules of Appellate Procedure is not appealable "at least so long as the earlier order is itself appealable and has been timely appealed." F.2d at , slip sheet op., p. 3939, is unfortunate as a precedent, See 7 Moore's Federal Practice (2d. Ed.), para. 60.30, and 11 Wright and Miller, Federal Practice and Procedure, § 2871, and placed appellant in an impossible position in this case. Both treatises, loc. cit., supra, suggest the desirability of preserving such rulings for review (or possibly obviating the appeal, in the event the district court's original judgment is vacated) particularly where, as here, new material has been provided the district court after its original decision which indicates that it is erroneous.

Appellant's Rule 60(b) motion was made below well before the time for appeal from the original decision of May 7, 1976 had run. It must fairly be assumed that the district judge was aware of the time limitations on filing a notice of appeal from his original order and the hazards attendant upon relying on a notice of appeal from the Rule 60(b) motion to secure review of both orders. Moore, and Wright and Miller, loc. cit., supra. Yet the order below this court held unappealable was the only ruling on appellant's subpoena duces tecum which sought to bring into the record specified material from the United States Attorney's files and only there available which would have filled in the gaps in petitioner's proof which served as a basis for the original denial of the petition, the only ruling on the in camera use of the Maloney memorandum on the Friedland immunity and the use of that undisclosed memorandum by the court below to deny appellant relief on the merits. The timing of the court's decision on the Rule 60(b) motion was completely out of appellant's countrol. So, too, was the timing of the submission to the court of the Maloney memorandum by the United States Attorney six weeks after the court's original decision and the in camera submission of that memorandum after appellant had long sought it by motion and

application under the Freedom of Information Act as well as by subpoena. It cannot be said that a district judge can by the timing of a ruling on the merits and the United States Attorney by the timing of an in camera submission can insulate that decision from review and hold at the same time that appellant has received the safeguards of procedural due process.

The denial of due process below continued in this Court. The opinion herein upheld the district court's refusal to enforce appellant's subpoena (a ruling made only in the Rule 60(b) order, held here unappealable), stating "Silverman first did not serve the subpoena at the proper time and then when he did serve it tardily he did not press it." F.2d at , slip sheet op., p. 3943, a ruling which echoed that of the district court (157-8). Earlier in the same opinion it is stated, "Precipitately, Silverman's counsel served on the Government a subpoena duces tecum at a time when no court hearing had been scheduled." F.2d at , slip sheet op., p. 3941, emphasis added. There was only one subpoena served. It could not at once be too soon and too late. It is respectfully submitted that the difficulty this Court may have had in dealing with this issue

results from the failure to hold a hearing below, which in turn was used by the court below to deny enforcement of the subpoena. The failure to hold a hearing and the failure to enforce the subpoena was then used as a ground to deny the petition through the court's holding that appellant had failed to show that which the subpoenaed material would have demonstrated (appellant's main brief, p. 38 n.).

It is familiar principle of evidence that the failure of a party to produce evidence his opponent claims would establish essential facts is itself evidence that the opponent's-here appellant's-factual claim is correct. See II Wigmore on Evidence,(3d Ed. 1940), § 285. There is no question that the United States Attorney knew what evidence had been requested of his office, indeed the very least that can be said of his action as to the subpoena was that he admittedly brought it to the attention of the district court (144n.). There is also every indication that the court below knew of the outstanding subpoena before it reached its original decision (Appellant's main brief, pp. 40-41). Instead of drawing the inference that the failure to produce the material subpoenaed, moved for and otherwise requested by appellant was evidence that the facts were as he claimed, the district court treated it as a failure

of proof on his part. Unfortunately, this Court affirmed on that very basis. F.2d at , slip sheet op., p. 3942. That decision is contrary to rulings of other panels of this Court and of the Supreme Court (see appellant's main brief, p.37) which hold that under the circumstances here obtaining the government be required to produce the evidence under its control. Absent that, there is a denial of due process in a 2255 application.

An issue not touched on at all in the opinion herein is the impropriety of respondent's in camera submission of the Maloney memorandum dealing with Friedland's immunity and perjury. (See appellant's main brief, p. 37). Equally silent is the response to appellant's argument that not only should the court below have ordered disclosure of the memorandum to appellant, it should not have used it in reaching a determination on the merits without providing the opportunity for a hearing on it. (Id. at 37-8). In its second opinion, the court below stated the in camera memorandum merely disclosed "that the prosecutor surmised that Friedland's claim of his fifth amendment privilege was based on some involvement in the alteration of the union's books." (161) This evidently unreviewed conclusion, although contained in the second opinion held here unappealable, was again echoed in this Court's opinion: "No doubt the prosecutor had his suspicions." F.2d at , slip sheet op., p. 3942.

Not only did the district court accept the Maloney memorandum in camera, it thereafter ordered it sealed in the safe of the district court clerk's office, without, however, the usual provision that it be made part of the record on appeal (e.g., in the case of 18 U.S.C., Sec. 3500 material) but rather with the statement "that they can be made available should the Court of Appeals wish to review them." (Record on Appeal, Doc. 11n.3). It was therefore not part of the record on appeal. The statement in appellee's brief to the contrary (appellee's brief, p. 23n**) is plainly wrong. It thus appears that in addition to a decision against him on the basis of an in camera document below, appellant has also suffered an affirmance of that decision on a document not before this Court because of the procedure adopted below. This is plainly in conflict with Alderman v. United States, 394 U.S. 165, 182-3 (1969) and is a patent denial of due process.

On the basis of the opinions below, this Court concluded that "Friedland declined to confer with counsel for the prosecution, and gave the Government no advance knowledge of what he would say." F.2d at , slip sheet op., p. 3940. It passes belief that a seasoned prosecutor such as the one who prosecuted the case against appellant would put on the stand as his sole rebuttal witness, as the ultimate witness at the trial, a man who could make or break that case, on the other counts as well as count 18, without having prepared his testimony. Such a conclusion, that Friedland did not confer with the prosecutor is also contrary to the trial record

itself where Friedland testified and the prosecutor admitted that they had conferred when the prosecutor had informed Friedland that he too was a target. (A. 633)* That was a matter for exploration at a hearing. At such a hearing, there would be available for just decision of the issue of perjured testimony, the subpoenaed material, the in camera memorandum, the testimony of Friedland and the prosecutor, inter alia, not merely the "viva voce" exploration of the areas covered by the affidavits of Oschak, Sanchez and Brickman, essential as that would be to the issue of credibility reached by the district court without a hearing. F.2d at slip sheet op., p. 3943.

A related issue not passed on in the opinion was appellant's argument that even assuming against all probability that the prosecutor did not know precisely what Friedland's testimony would be before he gave it, his knowledge of Friedland's involvement in the change of the executive board minutes was sufficient to require him to inform the trial court and defense counsel of the perjury once that testimony was given. (Appellant's main brief, pp. 24-6).

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* The original trial record reflects the following testimony by Friedland, out of the presence of the jury, at the hearing on his invocation of the attorney client privilege and the Fifth Amendment: "About a month ago I talked with Mr. Maloney, he talked to me about it, and he advised me that I was a target for an investigation under this report, . . ." The prosecutor agreed that he had conferred with Friedland and Friedland's counsel, (A. 633, 634).

At the very least these serious issues involving a perjury tainted conviction should have been explored at a hearing not summarily rejected on the assumption that Silverman and his trial counsel knew all along about Friedland's involvement, F.2d at , slip sheet op., pp. 3941, 3942, as to which there is not a shred of evidence.

A similar error is evident on the ruling as to the Chlystun perjury. On the basis of the partial discovery allowed of the government's case file, appellant's counsel was able to show the court that material there existed which would demonstrate that Chlystun had in fact to the knowledge of the government fabricated his testimony and that this had not been disclosed by the prosecution at trial (appellant's reply brief, pp, 16-17). This was all counsel could do in the face of respondent's refusal to produce and the district court's refusal to require it to produce this material. No denial was made by the prosecutor that this had in fact happened. On the basis of this record it cannot be said, consonant with due process, that the Chlystun testimony was fully litigated at trial and that appellant failed to make a prima facie showing of the knowing use of his perjured testimony. F.2d at , slip sheet op., pp. 3940, 3942.

It is respectfully suggested that this petition be granted, that the relief requested in appellant's main brief be also

granted, and that this case be resolved in the manner ordered in an opinion by the same panel that heard this appeal: "Since it appears the original judge might have difficulty in putting aside previously expressed views and reassignment is advisable to avoid the appearance of prejudgment, the case will be remanded to the District Court for reassignment in accordance with the principles stated in United States v. Robin, #76-1033 slip. op. 2591, 2593 (2d Cir. 3/30/77)." Holley, et al. v. Lavine, F. 2d , slip sheet op.,p. 3227 (2d Cir. Docket No. 76-7588, 4/27/77).

However, should this petition be denied, it is respectfully suggested that there be a hearing of this appeal en banc so that this Court as a whole have the opportunity to establish guidelines to safeguard due process in hearing and ruling on 2255 applications.

C O N C L U S I O N

FOR THE REASONS STATED HEREIN AND ON THE ORIGINAL APPEAL, THIS PETITION SHOULD BE GRANTED, THE ORIGINAL RELIEF REQUESTED ALSO BE GRANTED OR, ALTERNATIVELY, THAT THERE BE A HEARING EN BANC OR A STAY OF THE MANDATE PENDING APPLICATION FOR CERTIORARI.

Respectfully submitted,

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COUNSEL'S CERTIFICATE

The undersigned counsel for appellant hereby certifies that the within petition is submitted in good faith for a determination on the merits and not for delay.

Lloyd A. Hale

LLOYD A. HALE


ROBERT B. FISKE
JUN 13 1977